

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF TEXAS  
3 TYLER DIVISION  
4 SMARTFLASH LLC, ET AL. ) (  
5 ) ( CIVIL DOCKET NO.  
6 ) ( 6:13-CV-447-JRG-KNM  
7 VS. ) ( MARSHALL, TEXAS  
8 ) (  
9 APPLE INC., ET AL. ) ( FEBRUARY 4, 2014  
10 ) ( 1:05 P.M.

11 PRE-TRIAL HEARING  
12 BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP  
13 UNITED STATES DISTRICT JUDGE  
14

15 APPEARANCES:

16 FOR THE PLAINTIFFS: (See sign-in sheets docketed in  
17 minutes of this hearing.)

18 FOR THE DEFENDANTS: (See sign-in sheets docketed in  
19 minutes of this hearing.)

20 COURT REPORTER: Shelly Holmes, CSR-TCRR  
21 Official Reporter  
22 United States District Court  
23 Eastern District of Texas  
24 Marshall Division  
100 E. Houston Street  
Marshall, Texas 75670  
(903) 923-7464

25 (Proceedings recorded by mechanical stenography, transcript  
produced on a CAT system.)

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February 4, 2015

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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Be seated, please.

3 All right. This is the time for pre-trial hearing in  
4 the Smartflash versus Apple matter. This is Civil Action  
5 6:13-CV-447.

6 Let me call for announcements. What says the  
7 Plaintiff Smartflash?

8 MR. CALDWELL: Good afternoon, Your Honor. Brad  
9 Caldwell on behalf of Smartflash. Would it help the Court if I  
10 did just a few brief introductions --

11 THE COURT: I was going to ask you if you didn't  
12 volunteer, so please go ahead.

13 MR. CALDWELL: Perfect, perfect, Your Honor.

14 Mr. Johnny Ward will be trying the case with us,  
15 Mr. Jason Cassady and Mr. Austin Curry. And if I could also  
16 introduce Mr. Patrick Racz, who is the inventor and will be our  
17 corporate rep, and then seated next to him is Mr. Dennis Daily,  
18 who is an English barrister that works for the Plaintiffs. And  
19 the Plaintiff is ready, Your Honor.

20 THE COURT: And are you going to be presenting the  
21 argument today?

22 MR. CALDWELL: To the extent that we're talking about  
23 trial procedures, probably. To the extent it's about the --  
24 the Daubert that's pending, Mr. Cassady will be presenting that  
25 argument.

1 THE COURT: Okay. Thank you.

2 What says the Defendant?

3 MR. ALBRITTON: Thank you, Your Honor. Is it okay if  
4 I stand here?

5 THE COURT: You can announce from there,  
6 Mr. Albritton.

7 MR. ALBRITTON: Thank you, Your Honor. Eric Albritton  
8 on behalf of Apple. With me is Jim Batchelder and Ching-Lee  
9 Fukuda, also on behalf of Apple, and then David Melaugh is the  
10 director of patent litigation, and Cyndi Wheeler who is also  
11 here on behalf at Apple. And we're here and ready to proceed.  
12 And Mr. Batchelder will be addressing the issues related to the  
13 Daubert motion, Your Honor.

14 THE COURT: Okay. Thank you.

15 Well, counsel, a large part of today's hearing, and  
16 certainly we'll get to the Daubert motion, but a large part of  
17 today's hearing is so that I get a chance to see you, and you  
18 get a chance to see me, and we have an opportunity to make sure  
19 that as many questions that can be asked and answered before we  
20 select the jury are taken up and dealt with by the Court so  
21 there's as little confusion as possible.

22 As you're aware, we're set for jury selection here at  
23 9:00 a.m. on Monday, February the 16th. We'll begin trial the  
24 same day. However, you should know that the Court has a  
25 conflict on Friday, the 20th, so we will not be holding trial

1 that day. And I'll let the jury panel know that when we do the  
2 jury selection. That should be the only day where we'll have  
3 a -- a skip in consistent trial days. We will continue  
4 following that Friday, the 20th, on Monday, the 23rd.

5 As to jury selection, each side will be permitted 30  
6 minutes per side to examine the panel. My practice is you may  
7 use up to three minutes of your 30 minutes to give a very high  
8 level non-argumentative overview of your contentions and  
9 position in the case. That's a hard limit on three minutes.  
10 Don't go over it, or you'll hear from me from the bench. And  
11 it's a hard designation on it being non-argumentative. You're  
12 not to argue your case in voir dire.

13 From there, you should proceed to more generic  
14 questions and examination of the panel. I intend to seat eight  
15 jurors in this case, and each side will be afforded four  
16 peremptory challenges.

17 As you know, the case was originally scheduled for 12  
18 hours per side to put on the evidence. I've since agreed to  
19 increase that to 15 hours per side. I know the Defendant asked  
20 for 18. 15 is not going to change, so you don't need to urge  
21 that again.

22 Each side will be given 20 minutes per side for  
23 opening statements, and each side will be given 30 minutes per  
24 side for closing statements. The Plaintiff may split their  
25 closing between co-counsel, if you choose to. You're not

1 required to. I do require, though, that you must use at least  
2 50 percent of your time in your first closing argument. You  
3 can't get up there and give one minute and then reserve 29  
4 minutes until after the Defendant is finished. You've got to  
5 use at least 15 minutes in your first closing argument.

6           If you want, whether it's opening, closing, or any  
7 other matter where you're at the podium and you've got a fixed  
8 amount of time, if you want a warning on your time from me, ask  
9 me when you go to the podium. I'm happy to give you a  
10 five-minute, two-minute, one-minute, whatever warning you want,  
11 but you'll need to ask me for that.

12           The Court will be keeping the time through the trial,  
13 and periodically I'll be advising you either directly from the  
14 bench or through my law clerks about your remaining time.  
15 During recesses, don't hesitate to ask if you need an update  
16 and haven't gotten one.

17           During closing arguments, after both sides have  
18 rested, I want you to be aware that I consider closing  
19 arguments in a jury trial to be the pinnacle of seriousness and  
20 focused, and, therefore, I want you to refrain from moving  
21 around the courtroom. I want you to instruct your support  
22 staff, your observers that you have communications with,  
23 anybody that's under your control, I don't want people getting  
24 up, moving around, the door opening and closing, or anything  
25 that would distract the jury from the full attention focused on

1 counsel's final arguments. I consider that -- of course, at  
2 all times during the trial, you should work to minimize any  
3 disruptions, but those efforts should be redoubled, if not  
4 tripled, during closing argument.

5           Also, it's my practice, and I know Mr. Ward and  
6 Mr. Albritton know this, having tried various cases before me  
7 before, and I will say both -- both sides have exceptionally  
8 qualified local counsel. I hope you will use them to the  
9 fullest extent they're available to you. But both local  
10 counsel know it is my long-standing practice to direct that  
11 witnesses and counsel will not refer to individuals by first  
12 name only during the trial. Call the person that's being  
13 talked about John Smith or Mr. Smith, but don't call him John.

14           And I will direct that counsel instruct their  
15 witnesses in this regard, and if the witnesses violate the  
16 rule, I'll hold you accountable, because I'll determine that  
17 you haven't instructed them as I've told you to. So that's --  
18 that's a matter that I think comports with the level of decorum  
19 that's expected in a United States District Court. It also  
20 protects the record from any confusion, given the likelihood  
21 that there may be more than one person with the same first name  
22 that's going to be referred to through the trial.

23           I don't see an easel in this courtroom. Counsel, I  
24 know that you all are coordinating and providing some of the  
25 electronics and other things for use in the courtroom. Do we

1 anticipate there being an easel with markers in the courtroom?

2 MR. WARD: We'll make sure there is one. We'll want  
3 one, so I'm sure we can coordinate and get that taken care of.

4 THE COURT: All right. Well, let's do this. Probably  
5 the best place to put it is somewhere against the wall past the  
6 jury box over there, and that will be the most convenient. And  
7 if you're going to use it and set it up, then just ask leave of  
8 the Court to do it. And then probably somewhere between the  
9 podium and the corner of the jury box is the best place.

10 I do want to remind you that my practice with not only  
11 charts like that or -- but with any other demonstratives is  
12 when you've finished your cross-examination, you need to turn  
13 the page if it's a chart, or if it's a demonstrative, place it  
14 so that it's not continually visible by the jury.

15 And also, opposing counsel will have free use of  
16 demonstratives that you put up and vice versa. Once you've  
17 used it, it's -- it's fair game for the other side if they want  
18 to use it.

19 All right.

20 MR. WARD: Your Honor, is there a microphone that  
21 we'll have when we're over at the -- an easel?

22 THE COURT: There is a handheld microphone, and we can  
23 make that available, if need be. I'm sure we'll end up using  
24 it through the voir dire process to some extent.

25 MR. WARD: All right. Thank you.

1           THE COURT: It's my intention to be in chambers by  
2 7:30 each morning. And I will do my best to abide by that  
3 aspiration. And it's also my intent to bring in the jury and  
4 begin evidence during each day of trial at 8:30. That  
5 intervening hour, counsel, is for your benefit. You have a  
6 fixed amount of time to put on your case. One of the ways that  
7 we try to maximize the benefit of that fixed amount of time for  
8 you is that I make that hour available each morning so if there  
9 are late-breaking problems or disputes that have developed over  
10 night, I can take them up and deal with them during that hour,  
11 and it doesn't cost you any of your fixed time for trial.

12           So that hour's there for your benefit and use. If you  
13 need it, let me know. I will be in chambers by 7:30, but I'm  
14 not going to come out and poll counsel every morning. If  
15 something's come up, you need to let me know. If I don't hear  
16 from you, I'll assume there aren't any issues I need to take up  
17 with you before we bring the jury in.

18           And I'm not -- I'm not asking you to manufacture  
19 disputes for me to deal with during that hour, but it -- it's  
20 there for you use if those come up, and I can give some  
21 direction and some rulings that will streamline the trial of  
22 the case during the time that the jury's in the box.

23           I also will attempt to conclude each day's evidence  
24 somewhere around 5:30 to 6:00 o'clock. The Tyler Division is a  
25 large division geographically. We may well have jurors that

1 have 50, 60 miles to drive each night. I don't know that we'll  
2 have any terribly inclement winter -- winter weather. I  
3 haven't seen a long-term forecast that indicates that. But I  
4 don't intend to go later than 6:00 o'clock, if necessary.

5 My practice is not to let the clock dictate when we  
6 stop, but if -- to look for a logical place in the trial of the  
7 case, whether it's when you pass a witness or you move on from  
8 a major topic to another major topic. I'll look for a natural  
9 break. So it's not going to be exactly 5:30 or 6:00 -- 6:00  
10 o'clock or 5:45. It will be where we have a logical place  
11 that's not disjointed to break that day. But in a general  
12 sense, my target is to conclude each day's evidence between  
13 5:30 and 6:00.

14 Also, unless something changes, my typical practice is  
15 that I will probably have one recess during the morning, and  
16 typically two recesses in the afternoon. And those are  
17 generally spaced out hour and a half to two hours, depending on  
18 how things are flowing in the trial. And I certainly reserve  
19 the right to alter that if the circumstances warrant it, but  
20 that's my general target as far as recesses.

21 Also, given that this is a patent trial, I want to  
22 address with you the Court's practice with regard to  
23 confidentiality. If you have something of a confidential  
24 nature that is going to be brought up during the trial and you  
25 do not want it to end up in the transcript, then you need to

1 ask me to seal the courtroom. The redaction practice is only  
2 for Social Security numbers, driver's license numbers, those  
3 things that are particular to an individual's identity. It is  
4 not a broad brush we can fix everything that came up during the  
5 trial through redaction. That's not my practice, and I'm not  
6 going to allow wholesale redactions of the transcript after the  
7 evidence is complete.

8 But if I seal the courtroom at counsel's request, then  
9 clearly that seals that portion of the transcript. So if  
10 you've got confidential information that may come out in the  
11 trial, you need to -- you need to ask me to seal the courtroom.

12 Also, I'd like to have some warning about that. I'd  
13 like to know that's coming. If -- if we get to Wednesday and  
14 you're pretty sure that may come up in Wednesday's portion of  
15 the trial, you need to tell me between 7:30 and 8:30 so I'll  
16 have some idea. I don't like surprises. So anything you can  
17 do to prevent me being surprised will work to your benefit, I  
18 assure you.

19 All right. I understand both sides have filed a list  
20 of pre-admitted exhibits and that there aren't any remaining  
21 disputes as to designated deposition clips. I have been told  
22 that there seems to be some continuing discussion about the  
23 issue of door opening and what can come up in if and when the  
24 door is opened. I would expect there to be final lists of  
25 pre-admitted exhibits before we begin jury selection.

1           From that list of pre-admitted exhibits, counsel are  
2 free to use and display those items before the jury without a  
3 predicate. They've been pre-admitted for that express purpose.  
4 That, too, is another way the Court maximizes the use of the  
5 designated and fixed amount of trial time for each side. That  
6 avoids the waste of time for objections and predicates and so  
7 forth and so on. You can simply use, as you wish, any item  
8 from the list of pre-admitted exhibits that you choose to.

9           However, you need to understand -- and, again, I know  
10 local counsel is familiar with this, but for those of you that  
11 are not familiar with it, the fact that an exhibit is on the  
12 list of pre-admitted exhibits doesn't make it a part of the  
13 record in this trial. Only if it's used for the jury from the  
14 list of pre-admitted exhibits does it become a part of the  
15 record.

16           To keep account of this so there's no confusion, my  
17 practice is beginning on the second day of trial, which in this  
18 case we will get some evidence in on Monday afternoon, so  
19 probably Tuesday morning, before 8:30, I will come into the  
20 courtroom, and I will ask each side to go to the podium and  
21 read into the record the designations and exhibit numbers from  
22 any exhibits from the list of pre-admitted exhibits that they  
23 used during the preceding day's portion of the trial. And then  
24 I'll ask the other side if you agree with opposing side's  
25 rendition of those exhibit numbers. And we will do that on a

1 rolling basis each morning so that we won't have to keep lists  
2 and then do it all at one time afterward. But those exhibit  
3 numbers that are read into the record as having been used from  
4 the list of pre-admitted exhibits before the jury and during  
5 the trial, they are a part of the record in the case. The  
6 pre-admitted exhibits not so used and not identified in the  
7 record in that manner are not a part of the record in the case.

8           So someone on each side's trial team needs to be  
9 keeping up with that on a daily basis and be prepared each  
10 morning to go to the podium and read those exhibit numbers into  
11 the record for each side. But that's the practice I'll follow  
12 through the trial.

13           All right. Let me pause at this point and ask each  
14 side if there are any questions before we get to any remaining  
15 live disputes on the docket as far as procedure and practice  
16 and Court's custom. Are there anything that you'd like to ask  
17 me about that I haven't touched on?

18           MR. CALDWELL: Yes, sir, Your Honor. Thank you, and  
19 thank you for the background.

20           One question just to clarify about pre-admitted  
21 exhibits, and I think the -- the guidance from the Court is  
22 super helpful. But the parties have, to this point, I think,  
23 proceeded understanding that we had resolved certain objections  
24 if a door got up and a motion in limine no longer kept  
25 something out.

1           As I understand the Court's guidance now, if something  
2 is on the list as pre-admitted but still subject -- still  
3 excluded due to a motion in limine, we need to pull that off of  
4 the -- the pre-admitted list?

5           THE COURT: I don't think that's necessary, but the  
6 general rule still applies. And that is, if there's anything  
7 that's potentially subject to an order in limine from the  
8 Court, before it's used under any circumstance, you need to  
9 approach the bench and get leave from the Court to do so.

10          MR. CALDWELL: Very well.

11          THE COURT: So if you think the Defendants have opened  
12 the door and you attempt to, based on that, offer something  
13 that you believe might possibly be subject to an order in  
14 limine, then before you walk through that doorway with that in  
15 hand, you need to approach the bench, and we'll take it up, and  
16 I'll give you guidance from the bench, and we'll go forward.

17          MR. CALDWELL: Absolutely. And we would certainly  
18 intend to do that. I just -- I just wanted to make sure that  
19 it being on the pre-admitted list didn't trump the motion in  
20 limine thing, and we will --

21          THE COURT: No.

22          MR. CALDWELL: I think both parties agree we'll  
23 absolutely approach, Your Honor.

24          THE COURT: And that's consistent with the fact that  
25 if it's on the pre-admitted exhibit list and it's not used and

1 read into the record, it's not a part of the record. It goes  
2 away after the trial.

3 MR. CALDWELL: Perfect. Thank you, Your Honor.

4 THE COURT: Any other questions?

5 MR. CALDWELL: Yes, sir. Another -- another question  
6 I have is for opening. Do you -- do you prefer that the  
7 parties open here at the lectern or in the well nearby, just in  
8 terms of Your Honor's procedure --

9 THE COURT: Well --

10 MR. CALDWELL: -- and not wanting to get --

11 THE COURT: -- I have a general rule -- and, again,  
12 this is the first time I've tried a jury trial in this  
13 courtroom. So we'll see how things go, and I'll reserve the  
14 right to adjust as we go, given that this is a different  
15 setting. But my general rule is what's commonly called the  
16 arm's length rule. If you're within an arm's length of the  
17 podium, you're okay. If you're beyond an arm's length, then  
18 you're not okay unless you've asked leave of me to be at that  
19 position, and I've given it to you.

20 MR. CALDWELL: Yes, Your Honor. Thank you.

21 And then my final question, and I believe Mr. Ward  
22 had -- has some, too. I understand that Your Honor is breaking  
23 in a new courtroom for you. Have -- has Your Honor got an idea  
24 of where you want to organize the jurors for voir dire just in  
25 terms of if we want to kind of map out roughly where people

1 would be sitting. Are you envisioning the -- for example, the  
2 jury box and then the first few rows on this side or --

3 THE COURT: That's my plan. My plan is to seat the  
4 panel, the first 12 in the jury box, and then beginning on the  
5 first pew where the gentlemen you introduced as being an  
6 English barrister is sitting, from there and go back on that  
7 side. Leave the other side of the courtroom available for  
8 paralegals, support staff, any other people outside of the  
9 panel.

10 MR. CALDWELL: Thank you, Your Honor. And I think  
11 Mr. Ward may have a question or two.

12 THE COURT: Okay.

13 MR. WARD: Just a couple, Your Honor.

14 On the -- where the panel will be seated for jury  
15 selection, will the Court provide a chart, or do we need to  
16 have our own chart prepared?

17 THE COURT: Well, what we will do as a part of the  
18 introductory process before counsel are allowed to question  
19 the panel at all is I will have each member of the panel --  
20 they'll all be given a number once they're seated. And it's  
21 entirely likely that the front row of the jury box, the seat  
22 closest to the bench will be where Panel Member No. 1 ends  
23 up --

24 MR. WARD: Okay.

25 THE COURT: -- and then 6 and then 7 through 12 will

1 be on the back row, and then we'll start with 13 on -- from my  
2 angle, the left side of the gallery. And they will, as you're  
3 used to, go through and answer a list of predetermined  
4 questions. And you'll have plenty of time to write their names  
5 down, so --

6 MR. WARD: Okay.

7 THE COURT: -- bring your own grid with boxes in, but  
8 you'll have to fill it in. We won't do that for you.

9 MR. WARD: All right. Thank you.

10 And then on the juror questionnaires and the jury  
11 list, I know -- I understand the Court's practice is to give  
12 that to us on Thursday before jury selection on Monday. Do I  
13 understand that correct?

14 THE COURT: That's -- that's the practice we followed  
15 in Marshall. I'm not aware of a different practice in Tyler.  
16 However, I'm going to defer to the clerk's office here. I  
17 don't want to reinvent the wheel if they're used to doing  
18 something else. So in that regard, I'm going to direct that  
19 you be guided by whatever the clerk's office tells you.

20 I will -- I will continue my rule that those  
21 questionnaires must be turned back in before the end of the day  
22 or at the end of the day on the day of jury selection, and you  
23 are not permitted to scan, copy, or keep information in any  
24 form from those jury questionnaires. I'd like to be able to  
25 assure the members of the panel that that's the Court's

1 practice so they'll feel as free as they can to give full and  
2 complete answers when they answer those. So that rule is still  
3 going to apply.

4 MR. WARD: And I guess I didn't understand what the  
5 logistics were. Assuming we do get those on the Thursday  
6 before, do we get them here at the clerk's office, and the  
7 reason --

8 THE COURT: I'm sure you will.

9 MR. WARD: Okay.

10 THE COURT: They're not going to bring them to me in  
11 Marshall.

12 MR. WARD: Okay. Very well.

13 And then lunch break, how long -- I know we're going  
14 to be providing lunch for the jurors. How long will the  
15 attorneys have for a lunch break?

16 THE COURT: Well, that's a practice that is  
17 established in Tyler that's different than what I'm used to in  
18 Marshall. I'm told that where that practice is followed,  
19 typically the lunch break is somewhere around 40 or 45 minutes.

20 MR. WARD: Okay.

21 THE COURT: And we will -- we will try -- if that  
22 doesn't work, we'll either shorten it, or we'll extend it, but  
23 that's probably what we'll start out trying.

24 MR. WARD: All right. Thank you.

25 THE COURT: Mr. Albritton, you don't have to hobble up

1 to the podium if you want to stand there and ask questions.

2 MR. ALBRITTON: Thank you very much, Your Honor. I  
3 have a couple of brief follow-up questions.

4 THE COURT: And I'm not meaning to comment on your use  
5 of your crutches.

6 MR. ALBRITTON: I'm not terribly good with them. I  
7 will so stipulate, Your Honor.

8 A couple of minor things. It has been the typical  
9 practice in Tyler that counsel will be provided rooms where  
10 they can have lunch with the lawyers and their witnesses and  
11 the like. I wanted to see if there was any hesitancy on the  
12 Court's part with -- with that practice, or if we would be  
13 permitted to have rooms -- we can coordinate it, of course,  
14 through the CSOs, but just wanted for planning purposes to see  
15 if that was --

16 THE COURT: Well, as I understand it -- and, again,  
17 these are new facilities to me. I've been here many times, but  
18 not on the bench before.

19 As I understand it, the original jury assembly area,  
20 when this was the only courthouse, is available outside this  
21 courtroom and that that space, which is pretty ample, is  
22 usually used during the trial by one side or the other, both  
23 for dealing with witnesses, marshaling documents and hard  
24 copies and other tangible things, and I assume eating lunch.

25 During the week that we're going to be in trial here,

1 I'm told that Judge Davis will not be in trial, and there is  
2 something comparable available adjacent to his courtroom  
3 facilities which are just down the hall and around the corner.

4 So it's my -- it's my plan that those two areas will  
5 be available to each side. I want this to be as equal as  
6 possible. I don't want somebody to have an advantage over the  
7 other. I'm not completely sure how we're going to assign  
8 space. We may flip a coin, or we'll do something. I don't  
9 want it to be the first one to plant the flag gets to keep it  
10 there.

11 MR. ALBRITTON: Yes, sir.

12 THE COURT: I'm working on that, and we'll talk about  
13 that probably in more detail on the morning of jury selection.  
14 I intend that space and the other space, assuming my  
15 information is correct, and it's available, will be those two  
16 locations. But if something changes or if I get more  
17 information, be prepared to discuss about -- that further on  
18 the morning of the 16th.

19 MR. ALBRITTON: Thank you very much, Your Honor.

20 Another question, and I believe this is the  
21 appropriate time, and if not, I apologize in advance.  
22 Mr. Cassady and I have worked out a procedure and a protocol  
23 for clearing slides and exhibits and things of that nature  
24 during trial. And we -- we reached agreement on it yesterday,  
25 and we're great. There's -- there is just one -- and I really

1 hate to characterize it as a dispute, but there's one issue  
2 that we need the Court's guidance on.

3           As -- as you well know, for years, the appendix to the  
4 local rule required impeachment -- exhibits used for  
5 impeachment only to be listed on the exhibit lists. As -- as,  
6 of course, the Court is aware, that has been amended. So in  
7 this case, there are materials that potentially the parties  
8 will want to use for impeachment purposes, whether it be a  
9 document that has been produced in the case that has not been  
10 listed on an exhibit list or be it a transcript from another  
11 matter where a witness had previously given related testimony  
12 or learned treatise.

13           What we've been in discussions about, Your Honor, is  
14 whether there should be some procedure for clearing those  
15 things before they're brought out in front of the jury where  
16 there may be objections to them. We would respectfully suggest  
17 and have suggested to Mr. Cassady that before any such material  
18 is used, any material that's not on an exhibit list is used  
19 with a witness for impeachment purposes, that that material,  
20 but nothing else be disclosed the night before.

21           So a concrete example would be if Mr. Cassady  
22 anticipated -- reasonably anticipated using a -- a produced  
23 document on -- on the cross-examination of my witnesses  
24 without -- and it not being on the list, that the night before  
25 when we exchange our other -- and have our meet and confers on

1 the other matters, that those matters likewise -- likewise be  
2 disclosed so that if there are problems, they can be raised  
3 with Your Honor in that hour the following morning.

4 THE COURT: Mr. Ward?

5 MR. WARD: Yes, Your Honor. I've seen parties reach  
6 that type of agreement by agreement. Of course, parties  
7 typically reach agreement about the exchange of exhibits that  
8 will be used during a direct. But impeachment by its very  
9 nature, if we exchange -- here are the exhibits that we think  
10 we might use to impeach your witness, it's telegraphing where we  
11 think the -- the areas of cross are. And that's why we're  
12 opposed to disclosing those.

13 We expect that the witness will testify consistent  
14 with documents and transcripts of the prior sworn testimony.  
15 And we think it's not appropriate to lob that kind of stuff  
16 over the fence the night before to let that witness get ready  
17 on potential areas of cross.

18 MR. ALBRITTON: To make it clear, Your Honor, I'm  
19 not -- I apologize. And I think that Mr. Cassady and I talked  
20 about this, but we're not suggesting that all impeachment  
21 exhibits be exchanged the night before. I -- I'm a trial  
22 lawyer also, just like Mr. Ward, and love the idea of  
23 sneaking -- sneaking up on somebody.

24 THE COURT: Tell me what you are suggesting.

25 MR. ALBRITTON: Yes, sir. Anything that has not been

1 on an exhibit list that you reasonably anticipate using the  
2 following day with a witness be disclosed the night before no  
3 later than 8:00 o'clock.

4 THE COURT: Well, the exhibit list are -- are or  
5 should be finalized now. And we're not going to leave that  
6 door open to add things to the list of pre-admitted exhibits.  
7 And if this is not already agreed to and understood, then  
8 there's clearly the likelihood that one side or the other or  
9 both have things that may well be intended to be used for  
10 impeachment that they didn't put on the witness list and can't  
11 put on the witness list now.

12 So if both sides reach an agreement that otherwise  
13 would alter what I'm about to tell you, I'm certainly open to  
14 it. But it's going to need to be mutual. Failing a mutual  
15 agreement to the contrary, you're directed to disclose exhibits  
16 you intend to use during your direct examination by 7:00  
17 o'clock the night before. And if there are objections to it,  
18 those should be filed by 9:00 o'clock that night. Then I'll  
19 know by 7:30 what I've got to deal with the next morning, but I  
20 don't have a requirement that you disclose sources of  
21 impeachment in advance.

22 Now, if you can work out something you both agree to,  
23 fine. But to say if it's on the list of pre-admitted exhibits,  
24 you don't have to tell them you might use it for impeachment,  
25 but if it's not, then you've got to tell them the night before

1 does, in fact, telegraph that. And that list is closed and  
2 that door is shut, and I don't want to reopen it.

3 So had this come up earlier in the case before we  
4 finalized the list of pre-admitted exhibits, I might feel  
5 differently about it. But at this juncture, we're -- we're --  
6 barring some agreement from both sides that's different, that's  
7 what we're going to need to do.

8 MR. ALBRITTON: Okay. So I think I understand. May I  
9 ask one follow-up question?

10 THE COURT: All right.

11 MR. ALBRITTON: What I understand from the Court's  
12 ruling is that if it's not on an exhibit list, it -- it can't  
13 be used as an exhibit. And, therefore, there's no reason to  
14 disclose them the night before, or am I misunderstanding  
15 because I believe both sides did not include expressly  
16 impeachment exhibits on their list as a result of a change in  
17 the local rules.

18 THE COURT: Well, if it's going to be used solely for  
19 purposes of impeachment, I'm not going to disclose -- I'm not  
20 going to require early disclosure of it, given the posture we  
21 find ourselves in now.

22 MR. ALBRITTON: Yes, sir. Thank you very much.

23 THE COURT: Have there been discussions among counsel  
24 with regard to disclosing intended demonstratives, in addition  
25 to exhibits you intend to use?

1 MR. ALBRITTON: We have a complete agreement on that,  
2 Your Honor.

3 THE COURT: Tell me what that is so I'll know what it  
4 is.

5 MR. ALBRITTON: I don't remember the exact times.

6 MR. CASSADY: I think I do.

7 MR. ALBRITTON: Okay. I'll defer to Mr. Cassady.

8 MR. CASSADY: Your Honor, it's Jason Cassady for the  
9 Plaintiff Smartflash.

10 Right now, the agreement, I believe, is at 7:00  
11 o'clock, the offering party will disclose the demonstratives to  
12 the opposing side. I believe by 8:00 o'clock, the opposing  
13 side will object to those demonstratives. And I believe we had  
14 a set 9:00 o'clock meet and confer. I was going to bring that  
15 up to Your Honor because you -- I think you just said you  
16 wanted us to file our motion with you by 9:00 o'clock the night  
17 before about our objections.

18 THE COURT: I just want to be put on notice so that  
19 I'll know what to expect the next morning.

20 MR. CASSADY: Would it -- would it be okay with Your  
21 Honor if we had our meet and confer at 9:00 o'clock -- those  
22 meet and confers generally last 30 minutes, and then after  
23 that, we make our filings with the Court, you know, 30 minutes,  
24 an hour later. It will be late for Your Honor, but --

25 THE COURT: Well --

1 MR. CASSADY: Or an email to the clerk, Your Honor. I  
2 mean, whatever you prefer.

3 THE COURT: Let's say notice no later than 10:00 p.m.

4 MR. CASSADY: Okay. Thank you, Your Honor. That will  
5 work.

6 THE COURT: And there's no reason to have one rule for  
7 exhibits and one rule for demonstratives, so we'll make 10:00  
8 p.m. the cutoff for both exhibits and demonstratives that are  
9 going to be disclosed the night before.

10 MR. CASSADY: And depositions, I would assume, too,  
11 Your Honor?

12 THE COURT: Yes.

13 MR. CASSADY: Okay. And right now I think that --  
14 that will work with the timing we have, and then we'll do our  
15 best to -- to follow everything the Court says clearly.

16 THE COURT: All right. Is that clear with you,  
17 Mr. Albritton?

18 MR. ALBRITTON: Yes, sir, very much. Thank you, Your  
19 Honor.

20 THE COURT: Okay.

21 MR. CASSADY: If -- if Your Honor would like,  
22 Mr. Albritton and I have actually reached our agreement. We  
23 just couldn't get it papered formally to file with Your Honor.  
24 We could file our trial procedures with Your Honor so you're  
25 aware of those in more detail.

1 THE COURT: That's all right. We've got it in the  
2 record. And if a train comes off the track, we'll consult the  
3 record.

4 MR. CASSADY: No problem. Thank you, Your Honor.

5 THE COURT: Other questions, counsel, before we move  
6 on?

7 MR. ALBRITTON: I thought I had three, but now the  
8 last one is escaping me.

9 MR. CALDWELL: I'm happy to give you a minute to  
10 think.

11 MR. ALBRITTON: Rooms. Impeachment material, that --  
12 it must not have been terribly important, Your Honor.

13 THE COURT: All right.

14 MR. ALBRITTON: We have nothing further.

15 THE COURT: Mr. Caldwell?

16 MR. CALDWELL: Very simple question, Your Honor. In  
17 terms of notifying you at 10:00, I think this -- I remember in  
18 Judge Clark's court, he wanted us to email his -- his clerk,  
19 for example. Do you want a notice on file? Do you want a  
20 motion on file? Do you want it -- would we email, for example,  
21 Mr. DeArman? How does Your Honor like to be notified that  
22 here's the --

23 THE COURT: I -- I think the most efficient way is an  
24 email to my law clerks.

25 MR. CALDWELL: Thank you, Your Honor.

1 THE COURT: All right. Is there any question I need  
2 to take up with you -- with counsel regarding Judge Mitchell's  
3 previous rulings on Stephen Ansel and Jeffrey Lot -- Lotspiech?  
4 Are we straight on that, or do we need to nail that down one  
5 more time because I'm told it seems to pop up periodically.

6 MR. ALBRITTON: We're -- we're very clear on it, Your  
7 Honor.

8 MR. CALDWELL: And Plaintiff doesn't want to --  
9 Plaintiff objects to Mr. -- Mr. Ansel, but I don't want to  
10 reargue and replot old ground, so...

11 THE COURT: Well, I'm going to follow Judge Mitchell's  
12 orders, and I think they speak for themselves.

13 MR. CALDWELL: Understood.

14 THE COURT: Okay. I understand that we have pending  
15 objections to the report and recommendation on Plaintiffs'  
16 objections to Judge Mitchell's ruling regarding her granting in  
17 part of the Defendants' motion to exclude opinions from Robert  
18 Mills. That prior order, I think, is Document 374.

19 I understand there's still a live Daubert motion. I'm  
20 not talking about that. I'm talking about the objections to  
21 the original R and R. Those are denied, for the record. We'll  
22 get that cleared up right now.

23 We do have the remaining live Daubert motion to  
24 exclude opinion from Robert Mills under Rules 403 and 702,  
25 which is Document 434. And I'll hear brief argument from both

1 sides on that, and we'll take that up. And I'll hear from the  
2 movant first. I would hope we don't need more than about 10  
3 minutes a side.

4 MR. BATCHELDER: Thank you, Your Honor. James  
5 Batchelder, Ropes & Gray, on behalf of Apple. May it please  
6 the Court.

7 The -- and -- and I can handle this, I think, in less  
8 than 10 minutes to -- to summarize what I -- I see as -- as the  
9 two main defects of this Mills opinion.

10 To give Your Honor a bit of background. Mr. Mills'  
11 original report was the subject of the first Daubert, how the  
12 royalty base calculation that essentially involved two data  
13 points -- he took total revenue, and he multiplied it times a  
14 percentage of survey respondents who answered yes to a  
15 question. And that question for a given feature -- for  
16 example, the feature that he identified was the ability to  
17 download -- or buy apps from the App Store. So he took the  
18 percentage of people who answered yes to that question, and he  
19 multiplied that times total revenue, and that was his royalty  
20 base.

21 And the Daubert that Judge Mitchell granted on -- on  
22 that was essentially based on the notion that that royalty base  
23 calculation employed an entire market value rule approach, and  
24 that the question that had been asked, did X feature motivate  
25 you to buy, did not appropriately establish that for those

1     answering yes, it was the only feature that motivated the  
2     purchase. And the Court made clear that that would have been  
3     necessary in order to rely on the entire market value rule that  
4     had been done. So that's the background.

5             Then the way that -- that Mr. Mills responded was to  
6     rely on a survey that took that same feature and said, did --  
7     does this ability -- in other words, the ability to download  
8     apps from the App Store -- does this ability alone motivate you  
9     to buy the phone? And -- and he relied on that as establishing  
10    predicate for the entire market value rule. In other words, he  
11    interpreted that as measuring whether that feature was the only  
12    thing that motivated someone to buy something like an iPhone,  
13    again, an iPhone having thousands of features.

14            We established through counter surveys that replicated  
15    that question. So we asked the same question of respondents,  
16    and then for people who said, yes, to that question, we asked  
17    them about additional features because the -- the Wecker survey  
18    that Mills relied on asked only about that one feature. And  
19    100 percent of the respondents who had answered, yes, to the --  
20    yes, that ability alone motivated my purchase, 100 percent of  
21    those respondents answered yes to being motivated by other  
22    features, as well.

23            And so we believe that the record is irrefutable that  
24    that question and the way that Mills relied upon it still does  
25    not justify invocation of the entire market value rule, which

1 is what he relies upon it to do. So that's -- that's the main  
2 argument that we make.

3 And then the second one is simply that the -- the  
4 feature they identify, the ability to download apps from the  
5 App Store and buy apps from the App Store, that's too broad a  
6 feature, that -- that Mr. Racz himself does not contend that he  
7 invented the ability to -- to buy apps from the App Store and  
8 there has to be a coterminous relationship between an N --  
9 EMVR-type issue and -- and the -- and the patented feature, and  
10 the -- for those two reasons, we think Mr. Mills' continued  
11 reliance on that alone motivate question is improper.

12 THE COURT: All right. Thank you, counsel. Let me  
13 hear a response from the Plaintiff.

14 MR. CASSADY: Your Honor, I have some binders, but I  
15 think I can make the argument without handing up the documents,  
16 but if we get to a moment where I believe Your Honor may want  
17 to see some of the surveys, I'm happy to give those up to Your  
18 Honor. In fact, why don't I just go ahead and do that?

19 THE COURT: Don't ask me to tell you when. If you  
20 want me to ask for leave --

21 MR. CASSADY: So may I approach, Your Honor?

22 THE COURT: You may. And when you have something to  
23 hand up, hand them all to the courtroom deputy.

24 All right. Proceed.

25 MR. CASSADY: Thank you, Your Honor.

1           So I'll focus on the two defects that -- the alleged  
2 defects that Apple claimed here. With regards to the situation  
3 at hand, there's a little bit of history here, and I know Your  
4 Honor's aware of -- of Judge Mitchell's orders.

5           In this case, it's common for -- for our side --  
6 for -- for our firm to ask questions like how would you, Apple,  
7 evaluate the value of a certain feature? And in this case, we  
8 did that, as we do in lots of our cases. And in this case, we  
9 got an answer that was, basically, we don't measure that. We  
10 can't measure that. We're not going to measure that. That's  
11 your job.

12           And so we -- we sought out to analyze and value the  
13 patented feature here by running a survey.

14           Now, with regards to Judge Mitchell's order, Judge  
15 Mitchell found that because we did not include the word "alone"  
16 in our questions, at the behest of counsel for Apple that the  
17 word "alone" must be included in the question, we went out and  
18 re-ran the surveys, adding the word "alone." And that's what  
19 we did, again, at the behest of counsel and at the behest of  
20 the Court. And we were happy to do it for two reasons, Your  
21 Honor. One, if the Court believes that we were trying to slide  
22 one past the jury by not adding the word "alone," we wanted to  
23 prove to -- to Your Honor and -- and to -- and to her, to Judge  
24 Mitchell, that we were right in asking our questions the way we  
25 did, and we asked -- we added the word "alone."

1           Now, Your Honor, what happened when we did that, we  
2 got very, very similar results. A very, very similar set of  
3 people percentage wise said they were alone motivated by the  
4 feature in this case, just like they did in the prior question  
5 that did not include the word "alone." And so at the behest of  
6 counsel, we did it, and we presented that to the Court, and --  
7 and that's what's in front of Your Honor right now is the  
8 damages opinion that's based on that.

9           Now, with regards to -- so we -- we did exactly what  
10 LaserDynamics requires, we added the word "alone," and we asked  
11 the question, are you alone motivated by the feature in this  
12 case? And that's the way we asked it, clear as day, language  
13 directly from Federal Circuit law. That's the way we asked the  
14 question.

15           Now, even though counsel for Apple said we should add  
16 the word "alone," once we did that, a new host of complaints  
17 came up about asking the question with the alone motivated word  
18 in there. And those questions and those issues all go to  
19 weight is what I would tell Your Honor. The situation is they  
20 have a survey that they claim proves that our survey can't mean  
21 alone. We have a survey, and we have experts that believe our  
22 question means alone motivated under the Federal Circuit law.  
23 That's a fact issue that should be presented to the jury. It's  
24 a weight issue.

25           But more importantly, just to go directly to their

1 evidence, Your Honor, what they did was they had a counter  
2 survey, as -- as counsel recalls it where they first asked the  
3 question the way that we did. And they said, are you alone  
4 motivated by the accused feature in this case? And then they  
5 followed it up by questions that removed the word "alone." And  
6 so what happened was any survey taker, either a person with a  
7 Ph.D. or a person with a high school degree, Your Honor, would  
8 see that those two questions must mean something different  
9 because the word "alone" is missing.

10 And so what's happening now is counsel is saying since  
11 the new survey questions that they added got yes answers from  
12 people who said alone motivated, that must mean they weren't  
13 alone motivated. Well, that doesn't follow. What it means is  
14 the people who may have been motivated by some subset of the  
15 question later, that may be a feature that in the context of  
16 that survey they may require the product to have. And a lot of  
17 times that's referred to as table stakes. That'd be like the  
18 wheels for a car, Your Honor.

19 I may be driven to drive -- or to buy a sports car  
20 because it's fast, has a very large engine, lots of horsepower,  
21 but it doesn't mean I would buy a car that doesn't have wheels.  
22 Of course, I would be -- I'd require wheels on that car.

23 And -- and so what's happened, Your Honor, is we  
24 were -- we've kind of changed over. In the first survey that  
25 was motivated to buy, counsel for Apple said all we proved was

1 that the Apple's App Store was a requirement of people buying  
2 the device. That's what they -- that's what they said.

3 Now that we've asked alone motivated, they said, well,  
4 it can't be alone motivated because lots of things are required  
5 for someone to buy a product like this. And so what they're  
6 doing, Your Honor, is with regard to LaserDynamics, it makes it  
7 very clear -- in LaserDynamics, products can be alone motivated  
8 and still have other features that may be required in order to  
9 purchase it, or even may make the product commercially  
10 unviable, but the reality is what alone motivated someone to  
11 buy that product is what matters.

12 And so we've asked that question. We surveyed exactly  
13 what the LaserDynamics's requirements is, and we have that  
14 evidence. And they have a survey that they believe is counter  
15 evidence, and -- and we're going to have those issues of fact  
16 with regards to their survey in front of a jury.

17 Now, Your Honor, if you would, please, would you  
18 point -- would you turn to Page -- I apologize, Your Honor. If  
19 you turn to Page 21 of the slide deck that I put in front of  
20 you, it's behind Tab 1. If you could turn to Slide 21, please,  
21 Your Honor.

22 THE COURT: All right.

23 MR. CASSADY: Now, Your Honor, the reason that we  
24 contend that our alone motivated question is actually getting  
25 to the people who are solely or alone motivated by the accused

1 feature is because if you look here in the survey on Page 21,  
2 as an example, use apps from the App Store gets close to 57 or  
3 40 -- or 54 percent for users of -- of the device. Whereas as  
4 our survey, Your Honor, with the alone motivated question, we  
5 got 25 percent.

6 And so what they're talking about is people require  
7 this. This would be -- at least 57 percent of people use apps.  
8 But in our survey, there's a subset of people who required it,  
9 and it was the reason that they went and bought the device.  
10 And so what happens is, Your Honor, there's many -- many people  
11 that would go out and buy a vehicle, and they'd say I, really  
12 liked the -- the new color on the new Chevy truck. Other  
13 people really like the towing capacity. Lots of people could  
14 have required the towing capacity, but only some subset picked  
15 that specific Chevy because of its towing capacity. And that's  
16 what we're trying to get at here in the requirement of  
17 LaserDynamics. And that's what our question goes to.

18 And the surveys that are in front of Your Honor that  
19 are Apple surveys that were run by Apple, Pages 21 through 25  
20 of the slide deck I put in front of Your Honor, those are all  
21 surveys that show much higher percentages from Apple's own  
22 evidence of people the required the feature, whereas we asked  
23 about alone.

24 THE COURT: All right. Mr. Cassady, try and wrap this  
25 up for me.

1 MR. CASSADY: Okay. Easy enough.

2 Your Honor, if you could turn to Page 26 for me really  
3 quickly, or as quickly as Your Honor would like to. On Page  
4 26, Your Honor, this is a study that was done by Apple's  
5 largest competitor. And -- and in order not to seal the Court,  
6 Your Honor, I won't list -- I won't say the percentage, but if  
7 you look at the percentage in the middle of the page, that's  
8 the percentage that Samsung believes Apple got an uplift of  
9 devices because they added the accused feature, Your Honor.  
10 And so, again, that's much larger than the percentage that we  
11 have used in our survey.

12 Now, in addition, Your Honor, we asked another  
13 question about value. And we asked people if you weren't alone  
14 motivated, what percentage of the device was this feature? We  
15 asked that. And we got a number, and it's very similar to our  
16 alone motivated number. And we had a -- a separate damages  
17 model based on that. And it's not subject to any of the issues  
18 that Mr. -- I'm sorry, that Apple's counsel just brought up to  
19 you.

20 And, finally, Your Honor, with regards to identifying  
21 a product that's too broad, okay, a product that -- or sorry,  
22 our question being too broad -- the App Store question being  
23 too broad. If you look at the details of the question, Your  
24 Honor, we don't say did just buying stuff drive you to buy the  
25 Apple iPhone? We asked the question -- and if Your Honor would

1 like, I can point you to the slide that has the question on it.

2 THE COURT: That's fine. I want you to finish up.

3 MR. CASSADY: Okay. So, Your Honor, the -- the issue  
4 here is they're saying we didn't ask the right question. We  
5 asked the question in a common language that someone who uses  
6 the App Store would understand. And in this situation, the  
7 App Store infringes. So the way it's described is described  
8 in the infringing manner because that's the way the device  
9 works.

10 But fundamentally, Your Honor, our royalty rate is  
11 based on a question that is comparing the non-infringing  
12 alternative to our royalty rate or -- or, sorry, to our  
13 feature, and we say, would you have bought the device if Apple  
14 put their best non-infringing alternative in?

15 So the relationship between that question and the  
16 motivated to buy question deals with all LaserDynamics issues.

17 And with that, I'll -- I'll leave it to Your Honor.

18 THE COURT: All right. Mr. Batchelder, do you have a  
19 short response, and I do mean short?

20 MR. BATCHELDER: Thank you, Your Honor, I do.

21 I just want to call Your Honor's attention -- invite  
22 Your Honor's attention to one point that Mr. Cassady made  
23 because it's important because Mr. Cassady agrees with  
24 Mr. Mills and Dr. Wecker. Dr. Wecker took the survey.  
25 Mr. Mills is their damages expert, and they agree on one point

1 and that is that a respondent could accurately and truthfully  
2 answer yes to the alone motivated question even if that iPhone  
3 had but for features in that respondent's mind. And that is,  
4 even if that iPhone had features that if missing would have  
5 caused that respondent not to make the purchase. And I would  
6 submit that that is utterly inconsistent with the Federal  
7 Circuit's test for applying the entire market value rule. That  
8 feature has to be the only thing that drives the purchase.  
9 There cannot be other but for features.

10 Thank you.

11 THE COURT: All right. Thank you, counsel, for your  
12 argument. I've looked at this, I think, fairly  
13 comprehensively, and I appreciate the benefit of hearing your  
14 argument on it. The Court's conclusion is that this does not  
15 rise to a level that requires me to exercise my gatekeeping  
16 function and exclude this. This seems, to me, appropriate for  
17 argument and cross-examination before the jury, and a large --  
18 a large part of it falls within the jury's purview to weigh and  
19 allocate the evidence as they see fit.

20 I'm going to deny Defendants' motion with regard to  
21 this Daubert and Robert Mills.

22 Also, before we conclude this pre-trial today, I  
23 understand there was a previous ruling by Judge Mitchell on a  
24 summary judgment issue regarding indefiniteness, and there may  
25 be some confusion about whether that ultimately disposed of the

1 issue in this case.

2 My reading of her ruling is that it does, and I don't  
3 expect evidence to be presented of that during the trial.

4 Anybody have any question about that?

5 MR. BATCHELDER: If I could, Your Honor. I just want  
6 to be sure I'm understanding. So this is -- this is Judge  
7 Mitchell's denial of Apple's motion for summary judgment of  
8 indefiniteness, and the Court's guidance is that that ruling  
9 should be treated of -- a ruling as a matter of law, that the  
10 challenge claims are definite?

11 THE COURT: That's my understanding of her ruling, and  
12 I intend to enforce it that way through the trial.

13 MR. BATCHELDER: Thank you, Your Honor. Appreciate  
14 that.

15 THE COURT: All right. Gentlemen -- excuse me,  
16 counsel, I'll be here early on the 16th. And certainly if  
17 issues develop between now and then, though I'll be in trial in  
18 Marshall, if they're important, contact me through my clerks,  
19 and I will try to get back with you.

20 I will try to let you know prior to the 16th about the  
21 allocation and use of ancillary space. I want to run a few  
22 traps down and make sure that both sides are as equally treated  
23 in that regard as possible, and I need to see what's available  
24 and the length it will be available here in Tyler.

25 But with that, I appreciate your attendance. That

1 concludes this pre-trial hearing today. Counsel, you're  
2 excused.

3 COURT SECURITY OFFICER: All rise.

4 (Hearing concluded.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/ Shelly Holmes  
SHELLY HOLMES, CSR-TCRR  
OFFICIAL REPORTER  
State of Texas No.: 7804  
Expiration Date: 12/31/16

2/5/15  
Date